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EX PARTE OR LATE FILED



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March 18, 1997

RECEIVED

MAR 18 1997

Federal Communications Commission
Office of Secretary

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554

**EX PARTE: Telecommunications Services Inside Wiring
CS Docket No. 95-184**

Dear Mr. Caton:

GTE Service Corp. today sent the attached letter to Julius Genachowski, Counsel to Chairman Hundt, to detail GTE's position in the captioned docket. In accordance with Section 1.1206(a)(1) of the Commission's Rules, an original and two copies of this notice are being filed with the Secretary of the FCC.

Please feel free to call me if you have any questions regarding this matter.

Sincerely,

Whitney Hatch

cc: J. Genachowski

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March 18, 1997

Mr. Julius Genachowski
Office of Chairman Hundt
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Re: CS Docket No. 95-184 - Telecommunications Services Inside Wiring

Dear Mr. Genachowski:

We understand that the Commission is considering whether to adopt a further notice of proposed rulemaking in the above-captioned docket. Among the issues to be considered in that further notice include whether exclusive contracts between competitive multichannel video programming distributors (MVPDs) and owners of multiple dwelling units (MDUs) should contain term limits. For the reasons stated below, it would be both unlawful and inconsistent with past precedent for the FCC to adopt such a rule, and the Commission should therefore not seek comment on this issue as part of a further notice.

The FCC lacks jurisdiction over both owners of MDUs and MVPDs that are subject to effective competition, except in limited situations not relevant here. The FCC therefore has no general authority to regulate building owners or the way MVPDs subject to effective competition provide service to MDUs, including the use of exclusive contracts.¹

The permissibility of exclusive contracts between competitive MVPDs and building owners is already settled. The 1984 and 1992 Cable Acts contain no provision permitting the

¹ A rule limiting or prohibiting such contracts between MDU owners and operators of rate-regulated cable systems would, however, be authorized under section 623 of the Communications Act, which enables the Commission to ensure that the rates for service and equipment provided by monopoly cable system operators are reasonable.

FCC to mandate access by MVPDs to private apartments. In fact, language ensuring access by MDU tenants to MVPDs of their choice was dropped from the final version of the 1984 Cable Act, and has not been subsequently re-instated.² In acknowledging that this provision had been dropped, one Congressman commented that the preferred method of protecting and advancing cable television was through "negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided."³

Courts have acknowledged that Congress chose to allow building owners to have exclusive control over access to their property and have held that the owner has the discretion to select the video programming provider that provides service to its tenants. In *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3d Cir. 1989), the Third Circuit upheld a landlord's right to select a competitive MVPD to provide service to its tenants and to refuse a cable operator's request for access to the property. The court held that the applicable federal statute, 47 U.S.C. § 541(a)(2),⁴ did not give cable television operators a right of access to MDUs to provide service to tenants and instead leaves the selection of video programming provider "to the owner of the property."⁵ Likewise, in *Century Southwest Cable Television, Inc. v. CIIF Associates*, 33 F.3d 1068 (9th Cir. 1994), the court held that a landlord that has entered into an exclusive arrangement with a competitive MVPD is not required to allow another cable operator to have access to its property.⁶

² Section 633, which would have prohibited an MDU owner from interfering with construction or installation of any cable system requested by a tenant, was dropped from the version of the bill that was reported out of the House Committee on Energy and Commerce. Compare H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984), reprinted in H.R. Rep. No. 934, 98th Cong., 2d Sess. 13, with the Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2786.

³ 16 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields).

⁴ This provision was part of the Cable Communications Policy Act of 1984 and has not been amended by subsequent legislation.

⁵ 867 F.2d at 159.

⁶ *Id.* at 1069-71. Nor does section 628 provide any support for the Commission to interfere with private contract rights of building owners. Section 628 only prohibits cable operators and vendors of satellite cable and broadcast programming from denying MVPDs access to programming. Exclusive contracts are only prohibited between cable operators and satellite programming vendors, not between competitive MVPDs and building owners. See 47 (Continued...)

Any limitation on a landowner's ability to enter into an exclusive contract with an MVPD is also flatly inconsistent with the deregulatory tenor of the Telecommunications Act of 1996 (the "1996 Act"). The 1996 Act establishes a new framework for the future in which open entry and competition will replace the old regime of monopoly provision of telecommunications services and artificial constraints on competition. The intent of the legislation is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996). In fact, the Commission has recognized that Congress has sought, through the 1996 Act, to "build on prior efforts . . . by removing additional barriers to competitive entry in [the video programming] markets and establishing market conditions that promote the process of competitive rivalry." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, 1997 WL 2451 (released January 2, 1997). Accordingly, the Commission should seek to eliminate regulations where competition is present, rather than imposing new restrictions on already competitive activities.

Moreover, the authority granted to the FCC under Section 4(i) of the Communications Act does not support regulation of exclusive contracts because such regulation would be inconsistent with the other sections of the Act described above. Section 4(i) does not authorize the Commission to take any steps that are "inconsistent" with other legislative directives. *North American Telecommunications Ass'n v. F.C.C.*, 487 F.2d 865 (2d Cir. 1973); *North American Telecommunications Ass'n v. F.C.C.*, 772 F.2d 1282, 1292 (1985). As explained above, a rule limiting a building owner's ability to contract with competitive video programming providers other than franchised monopoly cable operators would be in direct conflict with the right of building owners to select MVPDs and the deregulatory provisions of Title VI of the Act, and therefore would not be authorized by section 4(i).

Not only does the Commission lack jurisdiction to regulate exclusive contracts between building owners and competitive MVPDs, but such regulation would contravene past Commission precedent. The commission has traditionally refused to interfere with a building owner's relationship with its tenants, which is governed by private contract and state law protections. For instance, the Commission has declined to consider a challenge by amateur radio operators to provisions of their apartment leases that restrict their ability to erect antennas and other communications equipment. In so deciding, the Commission held that, as a general rule, it is not concerned with contractual agreements between private parties. *Federal*

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Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 FCC2d 952, 954 (1985).

As GTE and numerous other parties in this proceeding have stated previously, exclusive contracts entered into between MDU building owners and new entrant MVPDs provide many benefits. Exclusive contracts enable start-up MVPDs to offer affordable rates to consumers while at the same time providing these MVPDs a reasonable opportunity to ensure that eventually operations will become profitable. In many circumstances, this is the only way MVPDs can succeed in breaking a monopoly cable operator's hammerlock on MDU customers. Thus, contrary to the arguments of the incumbent cable operators in this proceeding, exclusive contracts promote competition and new entry. The FCC should therefore refuse to break with its precedent that avoids interference with private contracts, particularly where there is no FCC authority to support such action.

Sincerely,



Whitney Hatch
Vice President
Regulatory Affairs

cc: Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Rachelle B. Chong
Commissioner Susan Ness
R. Chessen
R. Dorch
M. Jones
J. Logan
J. Lucanik
M. MacBride
J. Nakahata
S. Toller
A. Wallgren